Tulsa Law Review

Volume 21 | Issue 1

Fall 1985

When Fundamental Rights Collide: Guinn v. Collinsville Church of Christ

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WHEN FUNDAMENTAL RIGHTS COLLIDE: *GUINN v. COLLINSVILLE CHURCH OF CHRIST*

I. INTRODUCTION

The Bill of Rights[1] was intended by the framers to prevent "encroachments upon the liberties of the people."[2] The first amendment religious freedoms[3] were drafted in order to protect against encroachments upon religious liberty, and are central to this country's national identity. Privacy rights of the individual,[4] although not recognized as a distinct legal concept until this century,[5] have gained increasing constitutional,[6] judicial,[7] and statutory[8] protection during the past two decades.

As a new area of the law develops it will often come into conflict with established legal principles. When such conflicts occur between two rights recognized under the Constitution, the courts are faced with the difficult task of determining the interrelationship of those rights.[9]

An Oklahoma District Court was recently faced with the duty of deciding between two apparently conflicting constitutional rights. The case of *Guinn v. Collinsville Church of Christ*[10] presents the issue of whether the free exercise rights of a religious congregation constitute a valid defense to a claim of invasion of privacy. The purpose of this Note

1. U.S. CONST. amends. I-X.

2. A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION 152 (4th ed. 1970). The Antifederalists, chief among them Patrick Henry and Luther Martin, fought for inclusion of the Bill of Rights in the Constitution for fear that their exclusion would destroy state sovereignty. The Federalists, led by James Madison and C.C. Pinckney, initially opposed the inclusion of the Bill of Rights. *Id.* at 152-53.

3. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. *See also* OKLA. CONST. art. I, § 2 ("Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship . . . .").

4. *See infra* notes 57-81 and accompanying text.

5. *See infra* notes 57-66 and accompanying text.

6. *See infra* notes 67-74 and accompanying text.

7. *See infra* notes 60-66 and accompanying text.

8. *See infra* note 64 and note 69 and accompanying text.

9. When two fundamental rights are asserted one against another, the courts are forced to weigh the respective merits of the rights asserted on a case by case basis. All constitutional rights are on an equal footing and there is not priority among them. Nebraska Press Assoc. v. Stuart, 427 U.S. 539, 561 (1976). An asserted "fundamental" or "preferred" right under the Constitution can only be overcome by a compelling state interest. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1000 (1978) (development of strict scrutiny standard).

10. No. CT-81-929 (Dist. Ct. Tulsa County, Okla. Mar. 15, 1984), *appeal docketed*, No. 62,154 (Okla. Apr. 16, 1984).

is to examine the verdict in *Guinn* against the backdrop of tort and constitutional law principles, as well as to anticipate the Oklahoma Supreme Court's review of the trial court decision.

II. STATEMENT OF THE CASE

A. *Facts*

Marian Guinn moved to Collinsville, Oklahoma in February of 1974.[11] Guinn and her two children moved in with Guinn's sister, a member of the Collinsville Church of Christ, and began attending worship services at the Church.[12] Guinn eventually became a member of the Church.[13]

After obtaining her certificate of high school equivalency, Guinn started college studies in nursing.[14] Upon obtaining her degree, Guinn accepted a job as a nurse in nearby Tulsa which caused her to stop attending Sunday worship services on a regular basis.[15]

At some point during late 1979 or early 1980 Guinn, a divorcee herself, began dating a divorced man by the name of Pat Sharp.[16] One of the Elders of the Church[17] heard a rumor that Guinn had been the cause of Sharp's divorce.[18] The Elders of the Churches of Christ believe that they are obligated by their religion to approach members regarding spiritual problems and to discuss those problems with the affected parties.[19] They are responsible for the souls of the congregation.[20] With these duties in mind, the Elders met with Guinn to discuss the situation, and the Elders decided that the proper action would be for Guinn to cease seeing

11. Brief of Plaintiff-Appellee at 1, Guinn v. Collinsville Church of Christ, No. 62,154 (Okla. Apr. 16, 1984) [hereinafter cited as Brief for Appellee].

12. *Id.*

13. *Id.*

14. *See* Brief in Chief of Appellants at 6, Guinn v. Collinsville Church of Christ, No. 62,154 (Okla. Apr. 16, 1984) [hereinafter cited as Brief for Appellants].

15. *Id.* at 7.

16. *Id.* at 8; Brief for Appellee at 1-2, *Guinn.*

17. The term "Elder" is derived from three Greek words found in the Bible: *Presbyteros,* meaning "older one" or "elder"; *Episcopus,* meaning "overseer" or "bishop"; and *Poimen,* meaning "shepherd." The Elders are not official office holders, but rather serve as examples for the congregation and have the added responsibility to watch over the congregation. The Collinsville Church of Christ has three Elders. These Elders were chosen by a special committee within the Church. Nominees for consideration by this committee must possess special spiritual and leadership traits as set forth in *I Timothy* and *Titus.* Interview with Ralph Hunter, Minister of the Collinsville, Oklahoma Church of Christ, in Collinsville, Oklahoma (February 16, 1985); *see also* Testimony of Ron Witten, Trial Transcript at 268, *Guinn*; Testimony of Ted Moody, Trial Transcript at 366-67, *Guinn.*

18. Brief for Appellee at 2, *Guinn*; Brief for Appellants at 8, *Guinn.*

19. Brief for Appellants at 3, *Guinn.*

20. *Id.*

Pat Sharp.[21]

After their intial meeting, the Elders confronted Guinn several more times during 1980 and 1981 regarding her relationship with Sharp.[22] The Elders told Guinn that she was violating scripture and must repent for her sins of fornication.[23] The Elders informed Guinn that according to scripture they would have to tell her sins to the Church if she continued to refuse to repent.[24]

The Elders state that their decision to inform the Church was made in accordance with the disciplinary procedure contained in *Matthew*.[25] The Elders were apparently following the four step process spelled out therein which states:

> Jesus said that if your brother sins against you, you should go to him privately asking him to repent. If he refuses, you should go back with one or two witnesses. If he still refuses to repent, you should tell it to the Church. If he refuses to repent even then, you should . . . have no association at all [with him].[26]

At any time during this four step process, and even after the withdrawal of fellowship, the recalcitrant party may repent by recognizing the wrongful nature of his acts and ceasing to commit such acts.[27] Upon such repentance, the party can rejoin the congregation.[28]

Guinn responded to the Elders' demands by writing a letter to the Elders in which she stated that she withdrew her membership from the Church and specifically told the Elders not to mention her name in Church except to say that she had withdrawn her membership therefrom.[29] The Elders informed Guinn that she could not withdraw her

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21. *Id.* at 9.

22. *Id.* at 8-11.

23. *Id.* at 11. Fornication is derived from the Greek word *porneia*, which means "sexual immorality." F. YEAKLEY, IN DEFENSE OF CHURCH DISCIPLINE 8 (1984). Fornication, according to the Bible, includes "all sexual intercourse between people who are not lawfully married to each other." *Id.* (citing *I Corinthians* 5:1). Although Oklahoma has no fornication statute, local ordinances and court interpretation make penile-vaginal intercourse between persons married to one another the only legal sexual activity in the State. Comment, *Criminal Law: An Examination of the Oklahoma Laws Concerning Sexual Behavior*, 23 OKLA. L. REV. 459, 459 (1970).

24. Brief for Appellee at 5, *Guinn*; Brief for Appellants at 8-11, *Guinn*.

25. *Matthew* 18:15-17.

26. F. YEAKLEY, *supra* note 23, at 7 (citing *Matthew* 18:15-17).

27. Interview with Ralph Hunter, *supra* note 17. For a discussion of the withdrawal of fellowship, *see infra* note 32 and accompanying text.

28. Interview with Ralph Hunter, supra note 17.

29. Brief for Appellee at 6, *Guinn*. Guinn's letter stated in part:

> I do not want my name mentioned before the Church except to tell them that I withdraw my membership immediately! I have never fully accepted your doctrine and never will. Anything I told you was told in confidence and not meant for anyone else to hear. You have no right to get up and say anything against me in Church than someone would at work get up before the nursing staff and administration and say something that would be

membership from the Church and, according to their beliefs, she would always be a member.[30]

The following Sunday, September 27, 1981, a letter was read by the Elders to the congregation asking them to pray for and to contact Guinn so that she would have a "penitent heart".[31] The letter further stated that if Guinn did not respond by the next Sunday, another letter would be read detailing the scriptures which Guinn had violated and thereafter the congregation would "withdraw fellowship" from Guinn.[32] Guinn did not respond, so the second letter and the scriptures which Guinn had violated were read to the congregation on October 4, 1981.[33] This letter was mailed to four other Churches of Christ in the area.[34] Fellowship was then withdrawn from Guinn by the congregation.[35]

Guinn filed an action against the Church and Elders on October 26, 1981, claiming damages for defamation.[36] Guinn later amended her petition to state two invasion of privacy claims and a claim for intentional infliction of emotional distress.[37] Guinn decided to drop the defamation

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> harmful and detrimental and embarrassing to me and my family . . . . I have no choice but for all of us to attend another church, another denomination!

Letter from Marian Guinn to the Elders of the Collinsville, Oklahoma Church of Christ (Sept. 24, 1981). Guinn wrote the letter upon advice from a local attorney. This attorney had earlier written a letter to the Elders cautioning them that they would be subject to a lawsuit if they took any action violative of Guinn's legal rights. The Elders informed Guinn that the attorney's letter was irrelevant because this was a Church matter. Brief for Appellee at 6, *Guinn*.

30. Brief for Appellants at 5, *Guinn*. One becomes a "member of the body of Christ" when he embraces Christ's teachings. Interview with Ralph Hunter, *supra* note 17 (citing *I Corinthians* 12:27). Roughly stated—once a Christian, always a Christian. This is not to say that Guinn was not free to stop associating with the Congregation. The Elders' actions after Guinn's letter of September 24, 1981 were not based upon Guinn's association rights, or lack thereof, but rather upon the well being of the entire Congregation. *See infra* note 34.

31. *See* Brief for Appellants at 11, *Guinn*.

32. *Id.* "Christians should 'mark', or 'take note of' those who cause divisions and offences contrary to the doctrine . . . and 'turn away from them' or 'avoid them'." F. YEAKLEY, *supra* note 23, at 7 (citing *Romans* 16:17).

33. Brief for Appellants at 11, *Guinn*.

34. Reply Brief of Appellants at 5, Guinn v. Collinsville Church of Christ, No. 62,154 (Okla. Apr. 16, 1984) [hereinafter cited as Reply Brief for Appellants]. These four churches were located in Ramona, Skiatook, Oolagah, and Owasso, Oklahoma. The second letter was read, and copies were mailed to the above churches in order to "[p]rotect the church from the corrupting influence of the sinner and to protect the influence of the church in the community." F. YEAKLEY, *supra* note 23, at 11 (citing *I Corinthians* 5:1-13). Although Guinn stated that she withdrew as a member of the Church, the Elders believed that they were obligated under the scriptures to "protect the flock" by reading the second letter to the Congregation. Interview with Ralph Hunter, *supra* note 17. Copies of this letter were mailed to the other churches because there were members of those churches who had been members of the Collinsville Church when Guinn was a member there. Brief for Appellants at 3, *Guinn*.

35. Brief for Appellants at 11, *Guinn*.

36. *Id.* at 12.

37. *Id. See infra* notes 54-175 and accompanying text.

claim since the charges of fornication were true.[38]

The trial court jury returned a verdict awarding damages to Guinn on all three claims,[39] and the judgment entered on the verdict was appealed to the Oklahoma Supreme Court by the defendants.[40]

B. *Procedural History*

Guinn filed her initial Petition against the Church and Elders on October 26, 1981,[41] twenty-two days after the withdrawal of fellowship by the congregation. Guinn filed her Amended Petition on November 23, 1981 stating the three claims for which she eventually recovered at trial.[42] "The defendants filed a demurrer to plaintiff's petition on December 29, 1981, which was overruled. Further, defendants filed an Objection to Subject Matter Jurisdiction and Motion for Summary Judgment which the District Court overruled on October 15, 1982."[43] The Tulsa County District Court retained jurisdiction over the case and the defendants responded by filing a writ of prohibition with the Oklahoma Supreme Court.[44] When the Oklahoma Supreme Court refused to assume original jurisdiction,[45] the defendants applied to the

38. Brief for Appellants at 9-10, *Guinn*.

39. *Id.* The jury awarded Guinn the following amounts: Public Disclosure of Private Facts, $205,000.00 actual damages, $185,000.00 punitive damages; Intrusion Upon Seclusion, $114,000.00 actual damages, $120,000.00 punitive damages; Intentional Infliction of Emotional Distress, $122,000.00 actual damages, $81,000.00 punitive damages. The Court found that the damages awarded for the three claims overlapped, and that the proper judgment amount was $205,000.00 in actual damages and $185,000.00 in punitive damages. Brief for Appellee at 10, *Guinn*; Brief for Appellants at 12-13, *Guinn*.

40. Guinn v. Collinsville Church of Christ, No. CT-81-929 (Dist. Ct. Tulsa County, Okla. Mar. 15, 1984), *appeal docketed*, No. 62,154 (Okla. Apr. 16, 1984).

41. Petition, Guinn v. Collinsville Church of Christ, No. CT-81-929 (Dist. Ct. Tulsa County, Okla. Mar. 15, 1984).

42. Amended Petition, Guinn v. Collinsville Church of Christ, No. CT-81-929 (Dist. Ct. Tulsa County, Okla. Mar. 15,1984).

43. Petition for Writ of Certiorari at 4, Church of Christ of Collinsville, Oklahoma v. Graham, No. 82-1950 (May 31, 1983). *See infra* notes 186-200 and accompanying text.

44. Petition for Writ of Certiorari at 4-5, Church of Christ of Collinsville, Oklahoma, v. Graham, No. 82-1950 (May 31, 1983). Prohibition and Mandamus are actions at law in which a higher court commands a lower court or official to perform or refrain from performing some act. *See* Will v. United States, 389 U.S. 90, 95 (1967) (mandamus). *See generally* 16 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3932 (1977). In Oklahoma, Prohibition and Mandamus are accomplished by writ. OKLA. CONST. art. VII, § 4 (Supreme Court); OKLA. CONST. art. VII, § 7 (District Courts). Mandamus and Prohibition are extraordinary writs which a court will generally only issue where there is a clear legal right in the plaintiff for which there is no adequate remedy at law accompanied by a plain legal duty in defendant to act or not to act. *See* Garner v. City of Tulsa, 651 P.2d 1325 (Okla. 1982); Draper v. State, 621 P.2d 1142 (Okla. 1980); Goeppinger v. McIntosh, 376 P.2d 605 (Okla. 1962); McDonald v. Oklahoma Real Estate Comm'n, 268 P.2d 263 (Okla. 1954).

45. Church of Christ of Collinsville, Oklahoma, Allen Cash, Ted Moody, Ron Witten, and

United States Supreme Court for a writ of certiorari.[46] The United States Supreme Court denied the defendants' application on October 3, 1983.[47]

Discovery was completed by the parties and Pre-Trial Briefs were submitted on October 28, 1983.[48] The Pre-Trial Order was entered on January 3, 1984.[49] Trial was held March 13-15, 1984.[50] Defendants filed their Petition in Error with the Oklahoma Supreme Court on April 16, 1984.[51] It is expected that the Oklahoma Supreme Court will hear oral arguments in late 1985 or early 1986.

C. *Issues Presented*

The facts of the *Guinn* case raise several important tort and constitutional law issues. In reaching its decision on appeal, the Oklahoma Supreme Court will need to define the parameters of the free exercise clause in relation to privacy rights of the individual. The court will also have to address the applicability of the defense of qualified privilege to invasion of privacy claims. The decision on appeal, regardless of how the issues are determined, may break new ground in the increasingly important area of church-state relations.

III. ANALYSIS

In response to the three claims Guinn asserted at trial,[52] the defendants advanced two affirmative defenses to those claims: free exercise of religion and qualified privilege in tort.[53] This Note will discuss the prior law for each of the claims and defenses separately, followed by an analysis of their respective merits, and possible responses to the Oklahoma Supreme Court's decision on appeal.

Richard Fox v. Tony Graham, District Judge of the 14th Judicial District, No. 59,623 (Okla. Mar. 1, 1983).

46. Church of Christ of Collinsville, Oklahoma v. Graham, No. CT-81-929 (Dist. Ct. Tulsa County, Okla. Mar. 15, 1984), *petition for cert. filed*, 51 U.S.L.W. 3884 (U.S. May 31, 1983) (No. 82-1950).

47. Church of Christ of Collinsville, Oklahoma, v. Graham, No. CT-81-929 (Dist. Ct. Tulsa County, Okla. Mar. 15, 1984), *cert. denied*, 104 S.Ct. 85 (Oct. 3, 1983) (No. 82-1950) (mem.).

48. Pre-trial Brief, Guinn v. Collinsville Church of Christ, No. CT-81-929 (Dist. Ct. Tulsa County, Okla. Mar. 15, 1984).

49. Pre-trial Order, Guinn v. Collinsville Church of Christ, No. CT-81-929 (Dist. Ct. Tulsa County, Okla. Mar. 15, 1984).

50. Journal Entry of Judgment, Guinn v. Collinsville Church of Christ, No. CT-81-929 (Dist. Ct. Tulsa County, Okla. Mar. 15, 1984).

51. Petition in Error and Preliminary Statement, Guinn v. Collinsville Church of Christ, No. CT-81-929 (Dist. Ct. Tulsa County, Okla. Mar. 15, 1984).

52. Brief for Appellee at 9, *Guinn*.

53. Brief for Appellants at 14-36, 41, 54-60, *Guinn*. *See infra* notes 176-212 and accompanying text.

A. *Theories of Recovery*

1. Privacy Claims

Guinn stated two privacy claims in her Amended Petition: intrusion upon seclusion and public disclosure of private facts.[54] Although grouped together under the generic term "invasion of privacy",[55] intrusion upon seclusion and public disclosure of private facts are but two of four separate actions protecting privacy rights.[56]

Prior to 1890, no American or English court recognized an express right to privacy.[57] In their famous article,[58] Warren and Brandeis reviewed some earlier American and English cases in which relief was afforded on the basis of tort, property, or contract law, and concluded that these decisions were actually based upon the broader right to privacy.[59]

The first American decision to accept the right to privacy as an independent basis for recovery in tort was an unreported decision[60] of a New York trial judge, who enjoined a newspaper from publishing a photograph of an actress who "very scandalously appeared on the stage in tights."[61] After enjoying some acceptance in reported decisions,[62] the

54. Brief for Appellee at 9, *Guinn*.

55. The legal concept of "privacy" has been expressed in many ways: "The right to one's person may be said to be a right of complete immunity: to be let alone." COOLEY, TORTS 29 (2d ed. 1888); "[T]he interest of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears and publications of others." RESTATEMENT (SECOND) OF TORTS § 652A comment b (1977); "[R]ights of personhood." L. TRIBE, *supra* note 9, at 895. For a comprehensive review of privacy rights, see Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977).

56. Invasion of privacy is a complex of four torts: intrusion upon seclusion; appropriation of name or likeness; public disclosure of private facts; and false light. RESTATEMENT (SECOND) OF TORTS §§ 652B-652E (1977). Each separate action protects a different area of privacy rights. An action for intrusion upon seclusion exists where there is "an intentional interference with [the plaintiff's] interest in solitude or seclusion . . . of a kind that would be highly offensive to a reasonable man." *Id.* § 652B comment a. The action for appropriation of name or likeness protects plaintiffs from "the appropriation and use of [his] name or likeness to advertise the defendant's business or product, or for some similar commercial purpose." *Id.* § 652C comment b. An action for public disclosure of private facts lies where the matter disclosed would be highly offensive to a reasonable person and is of no legitimate concern to the public. *Id.* § 652D. A false light claim arises where publicity is given to a matter concerning another which places him in a false light before the public. Such false light must be highly offensive to a reasonable person, and the defendant must have knowledge of the falsity of the matter and the resulting false light, or the defendant must have acted with reckless disregard as to such falsity. *Id.* § 652E. *See generally* W. PROSSER & W. KEETON, THE LAW OF TORTS § 117 (5th ed. 1984); *Gerety, supra* note 55; Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960) (a discussion of the privacy causes of action).

57. W. PROSSER & W. KEETON, *supra* note 56, at 849.

58. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

59. W. PROSSER & W. KEETON, *supra* note 56, at 849.

60. *Id.* at 850 n.10 (citing Manola v. Stevens).

61. *Id.*

62. *Id.* (citing Corliss v. E.W. Walker Co., 64 F. 280 (D. Mass. 1894) (published photograph

principle was rejected by the courts of Michigan[63] and New York.[64] Beginning with the acceptance of the *Restatement of Torts* (*Restatement*) in 1939, the tide turned in favor of the recognition of privacy rights, and the cases rejecting the principle were overruled.[65] As of 1980, the right to privacy is recognized in one form or another in all but one of the states.[66]

The constitutional right to privacy[67] is a fairly recent development in the law. While the Constitution does not explicitly mention any right to privacy, the United States Supreme Court has recognized privacy as a fundamental right guaranteed by the Constitution.[68] The United States Congress has also recognized the existence of a constitutional right to privacy.[69]

Griswold v. Connecticut[70] is the threshold case regarding the constitutional right to privacy. The *Griswold* opinion represents the still developing nature of the law surrounding privacy rights and the continuing state of confusion regarding the scope of those rights. A fragmented plurality of Supreme Court Justices[71] attempted to establish a legal and phil-

held to be appropriation of likeness for commercial purposes); Schuyler v. Curtis, 147 N.Y. 434, 42 N.E. 22 (1895) (erection of statue of deceased person held to be appropriation of likeness for which decedent's family could recover); Marks v. Jaffa, 6 Misc. 290, 26 N.Y.S. 908 (Sup. Ct. N.Y. City 1893) (publication of plaintiff's picture in newspaper for a popularity contest of a most embarrassing kind held to be an invasion of plaintiff's right to privacy); MacKenzie v. Sodin Mineral Springs Co., 27 Abb. N. Cas. 402, 18 N.Y.S. 240 (N.Y. Sup. Ct. 1891) (unauthorized use of *facsimile* of physician's signature to sell medicine held to be appropriation)).

63. *Id.* (citing Atkinson v. John E. Doherty & Co., 121 Mich. 372, 80 N.W. 285 (1899)).

64. *Id.* at 850 (citing Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902)). The decision in *Roberson* was received with much animosity, which led to the unprecedented action of one of the judges publishing a law review article in defense of the decision. *Id.* at 850 (citing O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902)).

The New York legislature responded to the *Roberson* decision by enacting laws protecting privacy rights. *Id.* (citing 1903 N.Y. Laws, ch. 132, §§ 1-2 (codified as amended at N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1921) (designed to protect against what is now known as the tort of appropriation). This New York Act was upheld as constitutional. *Id.* at 850 n. 13 (citing Rhodes v. Sperry & Hutchinson Co., 193 N.Y. 223, 85 N.E. 1097 (1908), *aff'd*, 220 U.S. 502 (1911).

Other states, including Oklahoma, have enacted statutes protecting privacy rights. *Id.* at 851 (citing NEB. REV. STAT. §§ 20-201 to -211, 25-804.01 (1980); OKLA. STAT. ANN. tit. 21, §§ 839.1 to .3 (West 1981); UTAH CODE ANN. §§ 76-9-401 to -406 (1953); VA. CODE §§ 2.1-377 to -386 (1950); WIS. STAT. ANN. § 895.50 (West 1983)).

65. *Id.* at 851.

66. The only state which continues to refuse recovery in tort for claims based solely upon invasion of privacy is Rhode Island. W. PROSSER & W. KEETON, *supra* note 56, at 851.

67. Protection of a person's general right to privacy is for the most part left to the individual states. The United States Constitution also protects personal privacy from government invasion. Katz v. United States, 389 U.S. 347, 350-51 (1967).

68. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

69. "The Congress finds that . . . the right of privacy is a personal and fundamental right protected by the Constitution of the United States." 5 U.S.C.A. § 552a (West 1977) (Congressional Findings and Statement of Purpose, Pub. L. No. 93-579, section 2).

70. 381 U.S. 479 (1965).

71. The decision was a 5-4 plurality.

osophical basis for the constitutional right to privacy. Justice Douglas announced that the right to privacy exists in the penumbras of the first, third, fourth, fifth and ninth amendments.[72] Justice Goldberg stated that the ninth amendment, while not directly creating rights, authorizes the Court to identify fundamental personal rights not specifically enumerated in the first eight amendments.[73] Justice Harlan, while recognizing the right to privacy, failed to find that right in the Constitution, but rather found it to exist within natural law.[74]

Evolution of the law regarding privacy rights has traced the law of defamation. The actual malice standard of *New York Times Co. v. Sullivan*[75] was extended to false light invasion of privacy claims involving public officials and public figures in *Time, Inc. v. Hill*.[76] The court in *Hill* applied the *Sullivan* standard to false light claims, but left unanswered the scope of protection in matters involving the private lives of private citizens. This question was partially answered in *Cox Broadcasting Corp. v. Cohn*.[77] The Supreme Court in *Cohn* held that the first amendment prohibits a state from imposing tort liability for invasion of privacy from the broadcast of a rape victim's identity where such information is part of court records open to the public.[78] The Court left the scope of privacy rights of private citizens open for future cases by holding that states may protect privacy rights of the individual by prohibiting public disclosure of private matters if the prohibition is by means which avoid public documentation or other disclosure of private information.[79] The *Cohn* case did not address the applicability of *Hill* to non-false light privacy claims.

The standard enunciated in the *Hill* case may soon become inappli-

72. 381 U.S. at 484.

73. *Id.* at 493 (Goldberg, J., concurring).

74. *See id.* at 500 (Harlan, J., concurring).

75. 376 U.S. 254 (1964). A public official can recover damages for defamation only where the defamatory statement was made with " 'actual malice' that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. "Actual malice" is a term of art and is broader than spite or ill will. L. TRIBE, *supra* note 9, at 634 n.21.

76. 385 U.S. 374, 391-92 (1967); *see also* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (actual malice standard in defamation actions extended to private persons where newsworthy matter involved). *But see* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (overruled Rosenbloom v. Metromedia, Inc.).

77. 420 U.S. 469 (1975).

78. *Id.* at 491. The Court in *Cohn* was clearly balancing the right to privacy against the first amendment freedom of the press. *Id.* at 490-91. It is still unclear how the Court would hold if the information made public was not already part of the public record.

79. *Id.* at 489-90. *See generally* Phillips, *Defamation, Invasion of Privacy, and the Constitutional Standard of Care*, 16 SANTA CLARA L. REV. 77 (1975) (discussion of the development of privacy law in relation to defamation claims).

cable to invasion of privacy actions. The Supreme Court held in *Gertz v. Robert Welch, Inc.*[80] that any standard of care may be applied by the states to determine liability in libel actions brought by private persons so long as strict liability is not imposed.[81] The Supreme Court has not yet determined whether *Gertz* applies to invasion of privacy claims brought by private persons, but it is quite possible that *Gertz* will be applied to privacy claims just as *Sullivan* was applied to false light claims through *Hill.*

a. *Intrusion Upon Seclusion*

The unreasonable and highly offensive intrusion upon the seclusion of another is one of the four torts within the sphere of invasion of privacy.[82] Two elements must be shown in order to recover for intrusion upon seclusion:

1. an intentional intrusion upon another's solitude, seclusion, or private affairs or concerns[83] and;
2. the intrusion is one that would be highly offensive to a reasonable person.[84]

Recovery for intrusion upon seclusion is not dependent upon publicity given to the person whose interests have been interfered with, rather liability results from the interference itself.[85] Arguably therefore, the constitutional restrictions of *Sullivan* and *Gertz* are inapplicable to this tort.[86]

Oklahoma adopted the *Restatement* approach for privacy claims in *Munley v. ISC Financial House, Inc.*[87] The *Munley* case involved an alleged violation of privacy rights through a creditor's actions to collect a

80. 418 U.S. 323 (1974).

81. *Id.* at 347-48.

82. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

83. *Id.* comment c (1977).

84. *Id.*; *see* Munley v. ISC Financial House, Inc., 584 P.2d 1336 (Okla. 1978); Froelich v. Werkin, 219 Kan. 461, 548 P.2d 482 (1976); McClain v. Boise Cascade Corp., 271 Or. 549, 533 P.2d 343 (1975); Everett v. Carvel Corp., 70 Misc. 2d 734, 334 N.Y.S.2d 922 (1972).

85. *See generally* Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (photographing plaintiff in his home without his knowledge or consent); Thompson v. Jacksonville, 130 So. 2d 105 (Fla. Dist. Ct. App. 1961) (search of home without warrant); Sutherland v. Kroger Co., 144 W. Va. 673, 110 S.E.2d 716 (1959) (illegal search of woman's shopping bag in a store); Welsh v. Pritchard, 125 Mont. 517, 241 P.2d 816 (1952) (landlord moving in on tenant); Young v. Western & Atl. R.R. Co., 39 Ga. App. 761, 148 S.E. 414 (1929) (search of a home without a warrant); Byfield v. Chandler, 33 Ga. App. 275, 125 S.E. 905 (1924) (breaking into woman's bedroom on a steamboat); De May v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881) (intruding upon childbirth).

86. *Phillips, supra* note 79, at 99. However, the constitutional standard of care in *Sullivan* and *Gertz* could be applicable to the conduct of the defendant in intrusion upon seclusion actions by analogy. *Id.*

87. 584 P.2d 1336 (Okla. 1978).

bad debt.[88] The court found that the posting of notes on plaintiff's door, phone calls and visits to plaintiff by defendant's agents regarding payment of a debt legitimately owed to defendant by plaintiff, did not actionably intrude upon plaintiff's seclusion.[89] This conduct was not found to be highly offensive to a reasonable person.[90]

To support her claim for intrusion upon seclusion, Guinn introduced evidence that the Elders personally confronted her at least three times regarding her relationship with Pat Sharp.[91] The discussion at these meetings centered around Guinn's sexual relationship with Sharp.[92] It is the Elders' belief, according to the Bible, that sexual relations among persons not married to one another is sinful.[93] The Elders believe the purpose of the meetings with Guinn was to save her soul.[94]

Several cases have held that giving publicity to one's sexual conduct is an intrusion upon one's private affairs of a kind that is highly offensive to a reasonable person.[95] Guinn asserts that the Elders' intrusions and subsequent disclosure of private matters were of a nature which are highly offensive. The defendants assert that the Elders' conduct was not of a type that is highly offensive to a reasonable person because such conduct was required as part of the Elders' duty to watch over the congregation.[96] The defendants also argue that their acts were privileged because, as a member of the Church, Guinn accepted the rules thereof, including Church disciplinary procedure.[97]

b. *Public Disclosure of Private Facts*

Three elements must be shown in order to recover damages under the *Restatement* for public disclosure of private facts. There must be publicity given to the private life of the plaintiff which is highly offensive to a reasonable person and not of legitimate concern to the public.[98]

88. *Id.* at 1337-38.
89. *Id.* at 1340.
90. *Id.*
91. Brief for Appellee at 2-5, *Guinn*.
92. *Id.*
93. *See id.* at 4.
94. Brief for Appellants at 10-11, *Guinn*.
95. Garner v. Triangle Pub., Inc., 97 F.Supp. 546 (S.D. N.Y. 1951); Melvin v. Reid, 112 Cal. 285, 297 P. 91 (Cal. Dist. Ct. App. 1931); *cf.* Banks v. King Features Syndicate, 30 F.Supp. 352 (S.D. N.Y. 1939); Howard v. Des Moines Register and Tribune Co., 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980); Myers v. U.S. Camera Pub. Corp., 167 N.Y.S.2d 771 (1957).
96. Brief for Appellants at 54, 4, *Guinn*.
97. *See id.* at 21.
98. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

The publicity requirement for privacy claims differs from the publication requirement for defamation claims. The publication requirement is satisfied by any communication to any third person by the defendant. The publicity requirement, however, is satisfied only if the matter is "substantially certain to become one of public knowledge."[99]

Additionally, the publicized matter must be of a kind that would be highly offensive to the ordinary reasonable man.[100] Minor and moderate annoyances are not sufficient to give rise to a cause of action.[101] The publicity must be such that a reasonable person would feel seriously aggrieved thereby.[102] Further, the facts must involve the private life of the plaintiff.[103] Private facts are those that the plaintiff wishes to keep to himself and reveals, if at all, only to family or close personal friends.[104]

Finally, the public must not have a legitimate interest in having knowledge of the matter publicized.[105] The *Cohn* case[106] has limited the importance of this requirement, as any matter which is part of the public record may be publicized without resulting in liability.[107] This requirement is still important in cases involving matter which is not part of public record.

Oklahoma follows the *Restatement* approach for claims involving public disclosure of private facts.[108] The *Munley* case involved a claim for public disclosure of private facts in addition to the claim for intrusion upon seclusion.[109] The court did not discuss the separate elements of the cause of action in reaching their decision, but merely ruled that the *Restatement* approach precluded recovery.[110]

99. *See* Tureen v. Equifax, Inc., 571 F.2d 411 (8th Cir. 1978); Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9 (5th Cir. 1962); Schwartz v. Thiele, 242 Cal. App. 2d 799, 51 Cal. Rptr. 767 (1966); Peterson v. Idaho First Nat. Bank, 83 Idaho 578, 367 P.2d 284 (1961).

100. *See* Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); Sidis v. F-R Pub. Corp., 113 F.2d 806 (2d Cir. 1940); Emerson v. J.F. Shea Co., 76 Cal. App. 3d 579, 143 Cal. Rptr. 170 (1978); Cabiness v. Hipsley, 114 Ga. App. 367, 151 S.E.2d 496 (1966); LaForge v. Fairchild Pubs., 23 A.D.2d 636, 257 N.Y.S.2d 127 (1965).

101. RESTATEMENT (SECOND) OF TORTS § 652 D comment c (1977).

102. *Id.*

103. *Id.* § 652 D (1977).

104. *Id.*

105. *Id. See generally* Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977); Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975); Bereshy v. Teschner, 64 Ill. App. 3d 848, 381 N.E.2d 979 (1978); Hollander v. Lubow, 277 Md. 47, 351 A.2d 421 (1976) (general discussion on legitimate public concerns).

106. 420 U.S. 469 (1975).

107. *Id.* at 490-91.

108. Munley v. ISC Fin. House, Inc., 584 P.2d 1336, 1339 (Okla. 1978).

109. *Id.* at 1337 (involved disclosure of information to third persons about plaintiff's debt).

110. *Id.*

The Oklahoma Supreme Court again addressed the *Restatement* criteria for public disclosure of private facts in *McCormack v. Oklahoma Publishing Co.*[111] The court in *McCormack* held that a newspaper article disclosing the criminal record of a "one-time gambler and illegal casino operator" did not give rise to a cause of action for public disclosure of private facts.[112] The court specifically found that the matter publicized was already public, not highly offensive to a reasonable person and that the plaintiff had made no allegation that the publicized matter was of no legitimate concern to the public.[113]

The *Munley* and *McCormack* decisions represent the body of privacy law in Oklahoma. Unfortunately, the Oklahoma Supreme Court has not elaborated on the criteria for recovery. Although the *Restatement* criteria were fully adopted in *McCormack*,[114] the application of these criteria remains uncertain. For example, it is uncertain whether the court in *McCormack* intended to include the qualified privilege defenses when it adopted the *Restatement* approach to privacy claims.[115]

Guinn's cause of action for public disclosure of private facts centers around the letters which were read to the Collinsville congregation and mailed to four churches in the surrounding area which the defendants maintain had an interest in the letters' contents.[116] These letters contained matter regarding the private life of Marian Guinn[117] and scriptural citations to support the Elders' decision to withdraw fellowship from Guinn.[118]

The defendants claim that the publicity requirement was not met for at least two reasons. First, the defendants assert that the publicity requirement was not met because the right to privacy recognizes the right to be free from only *unwarranted* publicity.[119] "Any intrusion into the privacy of the appellee [plaintiff] resulted from her own conduct which was sinful and contrary to the religious teachings of the church."[120] The

111. 613 P.2d 737 (Okla. 1980).
112. *Id.* at 741.
113. *Id.*
114. *Id.* at 740. The Court also held that OKLA. STAT. tit. 23, § 3 ("Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.") allows the acceptance of new torts not yet recognized when Oklahoma adopted the common law. *Id.*
115. *See infra* notes 203-12 and accompanying text.
116. Brief for Appellants at 11, 57-61, *Guinn.*
117. Brief for Appellee at 7, *Guinn.*
118. *Id.*
119. Brief for Appellants at 53, *Guinn.*
120. *Id.* at 54.

Elders' actions could be viewed as warranted since they were apparently acting in accordance with the disciplinary process spelled out in *Matthew*.

Second, the defendants argue that the disclosure of the contents of the letter to the congregation was a disclosure to a limited and defined number of people and not to the public at large.[121] However, it is generally recognized that the publicity requirement is met where the disclosed matter is substantially certain to become one of public knowledge.[122] The second letter was read to the congregation during Sunday worship services.[123] The entire congregation of approximately 125 persons[124] was present in the Church when the second letter was read. It is not known if there were any visitors in the Church at the time the second letter was read. Collinsville, Oklahoma had a population of approximately 2,200 in 1981.[125] Therefore, almost 6% of the population of the town was present at the Church when the second letter was read. Although the publicity requirement for privacy claims is more difficult to meet than the publication requirement for defamation claims, it is arguable that the scandalous contents of the second letter were substantially certain to become public knowledge in such a small town.

Finally, the defendants claim that the disclosure by the Elders is privileged as a communication made in an official capacity to those with a common interest[126] and therefore warranted publicity.[127] The defendants argue that the matter disclosed in the letter was of legitimate concern to the members of the congregation since they all shared a common interest in the spiritual well being of Marian Guinn.[128] "The common interest of members of religious . . . associations . . . is recognized as sufficient to support a privilege for communications among themselves concerning . . . misconduct of some other member that makes him undesirable for continued membership."[129]

2. Intentional Infliction of Emotional Distress

Guinn's final claim was for the intentional infliction of emotional

121. *See id.* at 11.
122. *See* cases cited *supra* at note 100.
123. Brief for Appellants at 11, *Guinn*.
124. *Id.* at 2.
125. *Id.* at 8.
126. Brief for Appellants at 57-58, *Guinn*. *See infra* notes 203-06 and accompanying text.
127. *Id.* at 53, 62.
128. *Id.* at 57-62.
129. RESTATEMENT (SECOND) OF TORTS § 596 comment e (1977).

distress.[130] The law regarding recovery for this tort is still in the developmental stage, and the courts have been slow to accept the interest in being free from the intentional infliction of mental anguish as a protected right.[131]

There are basically three reasons why courts have been reluctant to allow recovery for intentional infliction of emotional distress. First, it has been argued, damages are difficult to determine.[132] This argument was advanced during the mid-nineteenth century but is no longer accepted today. Damages for mental suffering are no more difficult to estimate than damages for physical suffering, which have never been denied compensation.[133] Second, it was argued that mental and emotional consequences are so uncertain that they cannot be anticipated, and therefore cannot be the proximate result of a defendant's conduct.[134] This view was recognized in the late nineteenth century but has also been rejected. Medical science has long recognized that fright, shock, grief, anxiety, rage and shame very often have real physical effects upon the body.[135] Third, it was feared that recognition of the cause of action would result in a flood of fictitious and trivial claims.[136] However, this is an argument that has been made against all advances in tort law. The purpose of the law is to provide a remedy for those injured by unlawful conduct. The courts must often rely on common sense to distinguish fictitious and trivial claims from meritorious ones.

The early cases awarded damages for intentional infliction of emotional distress when common carriers[137] innkeepers[138] and public utili-

130. *See supra* note 37 and accompanying text.

131. W. PROSSER & W. KEETON, *supra* note 56, at 54. The classic article on the subject is Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

132. "[M]ental distress alone is too remote and difficult of measurement to be the subject of an assessment of damages." Gatzon v. Buening, 106 Wis. 1, 20, 81 N.W. 1003, 1009 (1900). *See generally Magruder, supra* note 131, at 1033.

133. W. PROSSER & W. KEETON, *supra* note 56, at 55.

134. *Id.* [I]t cannot be said that [the defendants'] manner, language, or gestures, or declared purpose . . . were naturally and reasonably calculated to, or it might be anticipated they would, produce the peculiar injury sustained by [the plaintiff]." Braun v. Craven, 175 Ill. 401, —, 51 N.E. 657, 664 (1898); "[P]laintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury." Mitchell v. Rochester Rwy. Co., 151 N.Y. 107, —, 45 N.E. 354, 354 (1896).

135. W. PROSSER & W. KEETON, *supra* note 56, at 56 (citing Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 498-99 (1922)).

136. *Id.* (citing *Magruder, supra* note 131, at 1035).

137. *Id.* at 57 (citing St. Louis-San Francisco R.R. Co. v. Clark, 104 Okla. 24, 229 P. 779 (1924); Bleecker v. Colorado & So. R.R. Co., 50 Colo. 140, 114 P. 481 (1911); Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S.W. 557 (1899); Cole v. Atlanta & W. Point R.R. Co., 102 Ga. 474, 31 S.E. 107 (1897)).

138. *Id.* at 58 (citing Milner Hotels v. Dougherty, 195 Miss. 718, 15 So. 2d 358 (1943); Dixon v.

ties[139] insulted or threatened their customers. Liability in those cases was based upon the "higher duty" owed by those defendants to their customers and not upon the plaintiff's interest in being free from unreasonable and outrageous mental anguish.[140]

A current statement of the law regarding the intentional infliction of emotional distress is compiled in the *Restatement*.[141] The *Restatement* provides for recovery where severe emotional distress is intentionally or recklessly caused by extreme and outrageous conduct of the defendant.[142] Although some jurisdictions, including Oklahoma, have held to the contrary,[143] the *Restatement* approach does not require a showing of physical injury independent from the mental or emotional injury in order to justify recovery for such mental or emotional injury.[144] Liability does not extend, however, to "insults, indignities, threats, annoyances, petty oppressions, or other trivialities."[145]

The seminal case illustrating extreme and outrageous conduct is *Wilkinson v. Downton*.[146] The defendant amused himself by telling the plaintiff that her husband had just been seriously injured in an accident when such was not true.[147] Plaintiff believed the defendant's false statements and suffered serious and permanent physical injuries as a result.[148] The court held that an act committed by the defendant which is meant to cause harm to the plaintiff infringes upon the plaintiff's legal right to personal safety, and plaintiff has a cause of action against the defendant for such an act.[149]

Cases after *Wilkinson* rested recovery wherever possible upon more familiar grounds.[150] By about 1930, so many cases of extreme and outra-

Hotel Tutwiler Op. Co., 214 Ala. 396, 108 So. 2d (1926); Freman v. Page, 238 Mass. 499, 131 N.E. 475 (1921).

139. *Id.* (citing Buchanon v. Western Union Tel. Co., 115 S.C. 433, 106 S.E. 159 (1920); Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 59 S.E. 189 (1907); Magnirk v. Western Union Tel. Co., 79 Miss. 632, 31 So. 206 (1902)).

140. *Id.* at 57-59.

141. RESTATEMENT (SECOND) OF TORTS § 46 (1977).

142. *Id.*

143. *See* Jines v. City of Norman, 351 P.2d 1048 (Okla. 1960); Duty v. General Fin. Co., 154 Tex. 16, 273 S.W.2d 64 (1954); Carrigan v. Henderson, 192 Okla. 254, 135 P.2d 330 (1943).

144. RESTATEMENT (SECOND) OF TORTS § 46 comment k (1977).

145. *Id.* comment d (1977).

146. [1897] 2 Q.B. 57.

147. *Id.* at 57.

148. *Id.* at 58.

149. *Id.* at 58-9.

150. W. PROSSER & W. KEETON, *supra* note 56, at 60 (citing Brents v. Morgan, 221 Ky. 765, 229 S.W. 967 (1927) (invasion of privacy); Salisbury v. Poulson, 51 Utah 552, 172 P. 315 (1918) (false imprisonment); Bouillon v. Laclede Gaslight Co., 148 Mo. App. 462, 129 S.W. 401 (1910) (trespass to land); Kurpgeweit, v. Kirby, 88 Neb. 72, 129 N.W. 177 (1910) (assault); Shellabarger v.

geous conduct had appeared that the courts began to treat extreme and outrageous infliction of emotional distress as a separate and distinct cause of action.[151]

The nature of a defendant's conduct may become extreme and outrageous where he abuses some relation or position he occupies with respect to the plaintiff.[152] Such conduct can be analogized to extortion.[153] Mere insults or annoyances, however, are not actionable in these cases unless extreme and outrageous in and of themselves.[154]

The plaintiff must also show that the defendant's conduct was intentional or reckless.[155] The conduct is intentional where "the actor desires to inflict severe emotional distress"[156] or where "[the actor] knows that such distress is certain, or substantially certain, to result from his conduct."[157] The conduct is reckless where the actor acts "in deliberate disregard of a high probability that emotional distress will follow."[158]

A plaintiff can recover damages only where the resulting emotional distress is severe.[159] Severe emotional distress includes "all highly unpleasant mental reactions."[160] The law provides a remedy where the distress inflicted is so severe that no reasonable man could be expected to endure it.[161] In some cases, the extreme and outrageous nature of the defendant's conduct is alone enough to show that severe emotional distress would result.[162] Other cases have required that physical injury result from the emotional distress before recovery will be allowed.[163]

Oklahoma law regarding the intentional infliction of emotional distress is a variation on the *Restatement* theme. No recovery will be allowed unless the emotional distress is produced by, connected with, or the result of physical suffering or injury to the plaintiff.[164] Even when this requirement can be satisfied the court must initially determine

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Morris, 115 Mo. App. 566, 91 S.W. 1005 (1905) (nuisance); De May v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881) (battery)).

151. *Id.* at 60.
152. *Id.* at 61; RESTATEMENT (SECOND) OF TORTS § 46 comment e (1977).
153. W. PROSSER & W. KEETON, *supra* note 56, at 61.
154. RESTATEMENT (SECOND) OF TORTS § 46 comment e (1977).
155. *Id.* comment i.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* comment j; *e.g.*, Breeden v. League Serv. Corp., 575 P.2d 1374, 1377-78 (Okla. 1978).
160. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1977).
161. *Id.*; *e.g.*, 575 P.2d at 1378.
162. RESTATEMENT (SECOND) OF TORTS § 46 comment j (1977).
163. *Id.*; *see* cases cited *supra* note 143.
164. Jines v. City of Norman, 351 P.2d 1048, 1052 (Okla. 1960).

whether the actor's conduct was extreme and outrageous before it may consider whether severe emotional distress resulted.[165] The effect of these requirements is that obtaining recovery for intentional infliction of emotional distress in Oklahoma is quite difficult.

Guinn's claim for intentional infliction of emotional distress is based upon the actions of the Elders both before and after Guinn wrote the letter stating that she withdrew her membership from the Church.[166] Guinn testified that after her meetings with the Elders she was unable to sleep and became physically ill.[167] Guinn also testified that she suffered from hypoglycemia which condition worsened when she became upset or was under stress.[168]

Before Guinn's injuries can be considered, however, it must be determined whether the Elders' actions were extreme and outrageous.[169] In order to be considered extreme and outrageous under Oklahoma law, the defendant's conduct "must be so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community."[170] The extreme and outrageous conduct required may arise from the abuse of a position of actual or apparent authority which the defendant enjoys over the plaintiff.[171] Both the Elders and Guinn understood the role of the Elders in the congregation.[172] The Elders' responsibility to watch over the members of the congregation placed them in a position of actual authority with respect to the congregation.

The Elders' conduct must constitute an extreme and outrageous abuse of their authority in order to be actionable. The Elders claim their authority directly from the Bible. Because they were apparently acting according to the disciplinary process spelled out in *Matthew*,[173] the Elders believe that their authority was clearly spelled out. The Elders

165. Taylor v. Gilmartin, 686 F.2d 1346 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983) (applying Oklahoma law); *cf.* Timmons v. Royal Globe Ins. Co., 653 P.2d 907 (Okla. 1982) (aggravation need not be severe or outrageous to be actionable where mental suffering is but one item of damage resulting from defendant's conduct). *See generally* Breeden v. League Serv. Corp., 575 P.2d 1374 (Okla. 1978) (conduct must be so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community).

166. Brief for Appellee at 31-32, *Guinn*.

167. *Id.* at 5.

168. *Id.*

169. *See supra* notes 141-45 and accompanying text.

170. *Breeden*, 575 P.2d at 1376.

171. *Id.* at 1377.

172. Testimony of Marian Guinn, Trial Transcript at 148 and Testimony of Ron Witten, Trial Transcript at 272, *Guinn*.

173. *Matthew* 18: 15-17; *see supra* notes 25-28 and accompanying text.

could meet with Guinn individually and then collectively. When Guinn did not repent they could then threaten to tell her sins to the Church and withdraw fellowship from her. Guinn alleges that the Elders abused their authority by repeatedly harrassing her.[174] The defendants contend that the Elders conduct was not extreme and outrageous since the Elders acted within the scriptural disciplinary process, thus not abusing their position of authority.[175]

The issue as to whether Guinn's damages for emotional distress meet the Oklahoma requirement that physical injury accompany the emotional injury is a fact question which is within the realm of the jury and will generally not be reviewed on appeal. The trial court jury did determine that Guinn suffered physical consequences as a result of the Elders' conduct.

B. *Affirmative Defenses Advanced By the Church and Elders*

The defendants have advanced two affirmative defenses to the claims brought by Guinn. First, the defendants assert that the courts do not have subject matter jurisdiction over cases involving purely ecclesiastical matters.[176] The defendants allege that by assuming jurisdiction in this case both the first amendment and the Oklahoma Constitution[177] have been violated.[178] Second, the defendants argue that the Elders' actions come within a qualified privilege.[179]

1. Free Exercise of Religion

The first amendment contains two separate and distinct clauses to protect religious freedom.[180] The establishment clause prohibits any law

174. Brief for Appellee at 32-34, *Guinn*.
175. Brief for Appellants at 42-45, *Guinn*.
176. *Id.* at 17, *Guinn*.
177. *See supra* note 3.
178. Brief for Appellants at 14-36, 41, *Guinn*.
179. *Id.* at 54-60.
180. The two clauses are, as a practical matter, in conflict. This conflict between the Establishment and Free Exercise clauses has been addressed at length by the courts and commentators. *See* Thomas v. Review Bd. Ind. Empl. Sec. Div., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970); Sherbert v. Verner, 374 U.S. 398 (1963); *see* L. TRIBE, *supra* note 9, at 812; *Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Gianella, *Religions Liberty, Nonestablishment and Doctrinal Development: Part II, the Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968); Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217 (1966).

The current approach taken by the courts is one of increasing accomodation of religion. *Compare* Zorach v. Clanson, 343 U.S. 306 (1952) *and* Everson v. Board of Educ., 330 U.S. 1 (1948) (doctrine of benevolent neutrality) *with* Sherbert v. Verner, 374 U.S. 398 (1963) (zones of required

"respecting an establishment of religion."[181] The free exercise clause bans any law "prohibiting the free exercise of religion."[182] The purpose of the religion clauses is to protect the freedom of every individual to worship.[183]

The free exercise clause is violated where government action or regulation places a substantial burden upon a religious belief or conduct.[184] Such regulations will be upheld only where there is a compelling state interest and the regulation is the least restrictive means of accomplishing that interest.[185] The accommodation approach dictates that if an exemption can be given to those whose religious beliefs are burdened by the regulation without adversely affecting the state interest advanced, such

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accommodation) *and* Lynch v. Donnelly, 465 U.S. 668 (1984) (affirmative duty, beyond mere tolerance, to accommodate religious beliefs).

The Free Exercise Clause should be dominant in any conflict with the Establishment Clause. L. TRIBE, *supra* note 9 at 833.

181. U.S. CONST. amend. I. The current Supreme Court approach to Establishment clause is in a state of flux. The traditional tripartite test was delivered in Lemon v. Kurtzman, 403 U.S. 602 (1971). The Court has applied the tripartite test to determine whether a particular government activity is permissible or impermissible under the Establishment clause: (1) Does the government activity have a secular purpose? (2) Does the government activity have the primary effect of neither advancing nor inhibiting religion? (3) Will the government activity avoid excessive entanglement with religion? The challenged activity must pass all three prongs of the tripartite test. *Id.* at 612-13; *see also* Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (secular purpose and primary effect tests); Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970) (entanglement test).

The *Lemon* test, although almost universally used by the Supreme Court, was attacked by Justice Burger in Lynch v. Donnelly, 465 U.S. 668 (1984). The future of the tripartite test is unclear, but previous attempts by commentators to reject the tripartate test have been unsuccessful. *See* Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961) (neutrality theory); Choper, *supra* note 180, at 673 (voluntarism theory). *See generally* Lacey, *The Struggle Over Deregulation of Religiously Affiliated Institutions: A Classic Internal First Amendment Conflict*, 26 ARIZ. L. REV. 615, 644-59 (1984) (discussion of establishment clause tests).

182. U.S. CONST. amend. I. The early cases interpreting the Free Exercise Clause distinguished between religious beliefs and religious conduct. Reynolds v. United States, 98 U.S. 145 (1879). "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." *Id.* at 164.

The modern cases have reaffirmed the absolute prohibition against government interference with religious beliefs, but religiously motivated activities are subject to regulation under the states' police power where the health, safety, and welfare of society are adversely affected by such activity. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 1057-63 (2d ed. 1983). *See infra* notes 184-86 and accompanying text (for a discussion of the current Free Exercise Clause test applied by the Supreme Court).

183. L. TRIBE, *supra* note 9, at 812-13 nn.4-5 (citing Abington School Dist. v. Schempp, 374 U.S. 203 (1962) (Brennan, J., concurring)); *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (dictum).

Both religion clauses of the first amendment are applicable to the states through the fourteenth amendment. The Free Exercise Clause was first applied to the states in Cantwell v. Connecticut, 310 U.S. 296 (1940). The Establishment Clause was first applied to the states in the landmark case of Everson v. Board of Education, 330 U.S. 1 (1947).

184. *See supra* notes 180-86 and accompanying text.

185. Sherbert v. Verner, 374 U.S. 398, 406-07 (1963).

an exemption must be given.[186]

a. *Lack of Subject Matter Jurisdiction*

The courts have been reluctant to settle disputes involving internal church affairs.[187] This hesitance of the courts to become involved in ecclesiastical issues is based in part upon the difficulty in mastering church "law" and terminology.[188] The Supreme Court has held that ecclesiastical decisions should not be subject to review by the courts.[189] Intervention by the courts in matters of church doctrine constitutes an impermissible entanglement between church and state in violation of the first amendment.[190]

Most of the cases presented to the courts have involved disputes over church property[191] or membership.[192] A conflict of fundamental rights occurs, however, when an ecclesiastical decision deprives a person of their civil and personal rights:

> [O]nce the stakes intersect the civil realm and implicate significant secular interests in property or personal liberty, governmental intervention in cases of evident overreaching becomes the only alternative to an otherwise unacceptable choice between perpetuating internal domination and inviting resolution by open force. In such cases the best that constitutional doctrine can achieve is to constrain the grounds on which courts act, instructing them above all to avoid modes of decision

186. *See id.*

187. L. TRIBE, *supra* note 9, at 877-78 (citing Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 447 (1967); Watson v. Jones, 80 U.S. 679 (1871) (in matters purely religious or ecclesiastical, the civil courts have no jurisdiction)). *See generally id.* at 870-82.

188. This statement is an oversimplification of the issue. Jurisdiction of civil courts in religious disputes is a complicated area of the law which cannot be adequately discussed within the scope of this Note. For an in depth discussion of this issue, see Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142 (1962); *cf.* Comment, *The Internal Affairs of Associations for Profit*, 43 HARV. L. REV. 993 (1930).

189. Zorach v. Clauson, 343 U.S. 306, 313 (1952); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); Watson v. Jones, 80 U.S. 679, 729 (1871).

190. *See* L. TRIBE, *supra* note 9, at 871. The Bible also addresses this issue:

> And when Gallio was the deputy of Achaia, the Jews made insurrection . . . against Paul, and brought him to the judgment seat, saying, This *fellow* persuadeth men to worship God contrary to the law. And when Paul was now about to open *his* mouth, Gallio said unto the Jews, If it were a matter of wrong or wicked lewdness, O ye Jews, reason would that I should bear with you: But if it be a question of words and names, and *of* your law, look ye *to it*; for I will be no judge of such *matters*. And he drave them from the judgment seat.

Acts 18:12-16.

191. *See* Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Watson v. Jones, 80 U.S. 679 (1871); *see also Note, supra* note 188. *See generally* L. TRIBE, *supra* note 9, 865-880.

192. *See* Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). *See generally* L. TRIBE, *supra* note 9, 865-880.

that involve resolving by law issues of religious faith or doctrine.[193] The rights of the individual are thus weighed against the rights of the Church. Religiously motivated conduct is protected by the free exercise clause, but should be subject to regulation when in conflict with the civil and personal rights of others.[194]

The subject matter jurisdiction issue in *Guinn* centers around the implementation of Church discipline as spelled out in *Matthew*.[195] Church discipline is most certainly an ecclesiastical matter over which the courts do not normally have jurisdiction.[196] A problem arises in this case because the civil and personal rights of Marian Guinn came into conflict with the process of administering that discipline. Guinn argues that the courts are free to assume jurisdiction over religious activities whenever a person's civil rights are violated.[197] The defendants assert that allowing recovery for Guinn is a government action which places a substantial burden upon their religious beliefs and conduct, and that protecting privacy rights of an individual is not a compelling state interest sufficient to defeat their religious rights.[198] The decision in this case is unconstitutional, the defendants argue, because it regulates scriptural church discipline which is clearly an ecclesiastical matter.[199]

2. Qualified Privilege in Tort

The Church and Elders have raised the defense of qualified privilege against Guinn's claims for invasion of privacy.[200] This defense has its origin in the *Restatement*.[201] The *Restatement* borrows the defense of qualified privilege from the law of defamation and applies it to privacy

193. L. TRIBE, *supra* note 9, at 882.

194. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 182, at 1057-63.

195. Matthew 18:15-17; *see supra* notes 25-28 and accompanying text. An issue related to whether the courts have subject matter jurisdiction in the *Guinn* case is Marian Guinn's associational rights. The defendants assert that all conduct of the Elders is privileged because Guinn will always be a member of the Church and cannot unilaterally terminate her membership. The trial court instructed the jury that Guinn had the right to terminate her membership with the Church at any time, an instruction which the defendants are contesting. Brief for Appellants at 39, *Guinn*. Further, the defendants argue that even if Guinn effectively withdrew her membership from the congregation, the Elders still had the right to tell her sins to the Church because such communications are privileged as between persons with a common interest. *See infra* notes 200-12 and accompanying text (a discussion of the qualified privilege defense). For an in depth review of the current law regarding associational rights see Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878 (1984).

196. *See supra* notes 187-90 and accompanying text.

197. Brief for Appellee at 11-15, *Guinn*.

198. Brief for Appellants at 54-60, *Guinn*.

199. *Id.* at 19-25.

200. *Id.* at 54-62.

201. RESTATEMENT (SECOND) OF TORTS § 652G (1977).

claims.[202]

There are several types of qualified or conditional privileges applicable to defamation actions.[203] The defendants in the *Guinn* case rely upon what is known as the common interest privilege. The common interest privilege precludes liability for statements made by and between persons entitled to share such information.[204] A comment in the *Restatement* section regarding the common interest privilege specifically states that the common interest of members of religious groups is sufficient to support a claim of privilege.[205] It is important to note that the common interest must exist between the members of the group and that the interest of the injured party is irrelevant.[206]

It is unclear whether the law of qualified privilege for defamation claims has been extended to privacy claims in Oklahoma. The defendants in the *Guinn* case indicate that the general *Restatement* approach for invasion of privacy claims has been accepted by the Oklahoma Supreme Court.[207] The defendants argue that Oklahoma should adopt the *Restatement* rule regarding qualified privilege in privacy actions since some intrusions are clearly warranted.[208]

The defendants also rely upon the fact that Kansas has applied the law of qualified privilege to privacy claims.[209] In *Munsell v. Ideal Food Stores*[210] the Kansas Supreme Court held that inquiries by the management of a food store regarding an employee's falsification of expense and pay records, and the somewhat coerced confession of the employee to management came within a qualified privilege and were therefore not actionable as an invasion of the employee's privacy.[211]

If the Oklahoma Supreme Court should decide to adopt the *Restate-*

202. *Id.* "Under any circumstances that would give rise to a conditional privilege for the publication of defamation, there is likewise a conditional privilege for the invasion of privacy." *Id.* comment a.

203. Protection of the publisher's interest. RESTATEMENT (SECOND) OF TORTS § 594 (1977). Protection of interest of recipient or a third person. *Id.* § 595. Common interest. *Id.* § 596. Communication to one who may act in the public interest. *Id.* § 596. Family relationship. *Id.* § 597. Communication by inferior state officers. *Id.* § 598A.

204. *Id.* § 596.

205. *Id.* comment e. *See* Pinn v. Lawson, 72 F.2d 742 (D.C. 1934); Rankin v. Phillippe, 206 Pa. Super. 27, 211 A.2d 56 (1965); Creswell v. Pruitt, 239 S.W.2d 165 (Tex. Civ. App. 1951); Slocinski v. Radwan, 83 N.H. 501, 144 A. 787 (1929).

206. RESTATEMENT (SECOND) OF TORTS § 596 (1977).

207. Brief for Appellants at 50, *Guinn* (citing McCormack v. Oklahoma Pubs. Co., 613 P.2d 737 (Okla. 1980)).

208. *Id.* at 50-60.

209. *Id.* at 52-54 (citing Munsel v. Ideal Ford Stores, 208 Kan. 909, 494 P.2d 1063 (1972)).

210. 208 Kan. 909, 494 P.2d 1063 (1972).

211. *Id.* at —, 494 P.2d at 1073.

ment approach for qualified privilege in privacy actions, the defendants' claim of privilege could be successful. The members of the Collinsville congregation arguably share a common interest in the spiritual well being of Marian Guinn within the meaning of the *Restatement*. Whether the acts of the defendants come within the common interest qualified privilege may become the pivotal question on appeal. It should be noted that a qualified privilege is lost if there is an abuse of that privilege.[212] However, abuse of privilege in privacy actions has not been addressed by the Oklahoma Supreme Court.

IV. CONCLUSION AND IMPACT OF THE DECISION ON APPEAL

The positions of the parties in *Guinn* are both quite strong. The outcome on appeal will rest upon how the Oklahoma Supreme Court applies existing law to the new factual issues presented by this case.

With regard to her claims for intrusion upon seclusion and public disclosure of private facts, Guinn has arguably established a *prima facie* case. The evidence presented at trial and the law cited by the parties does seem to support the jury's finding that Guinn's privacy rights were violated. The only element of these torts which seems questionable in this case is the requirement that the defendants' actions be of a type that are highly offensive to a reasonable person. The Elders advance their subjective belief that they acted with Guinn's best interests at heart and in accordance with their responsibility as Elders, therefore their actions could not be viewed as highly offensive to a reasonable person. However, whether the Elder's actions were highly offensive to a reasonable person is an objective question to be determined by the jury.

The defendants have asserted affirmative defenses to Guinn's claims which could preclude recovery. First, the defendants contend that this case should not be before the courts because it involves the determination of church discipline, which is purely an ecclesiastical matter beyond the jurisdiction of any court. Guinn has asserted a counter argument that jurisdiction may be assumed over church affairs where the civil and personal rights of another person have been violated.

Second, defendants have argued that the disclosure upon which Guinn bases her claim for public disclosure of private facts is subject to a

212. RESTATEMENT (SECOND) OF TORTS § 599 (1977). The privilege can be lost for publication of defamatory rumor, *Id.* § 602; action beyond scope and purpose of the privilege, *Id.* §§ 603, 605; excessive publication, *Id.* § 604; publication of unprivileged matter in addition to the privileged matter, *Id.* § 605A.

common interest qualified privilege. Although Oklahoma has adopted the *Restatement* approach to privacy claims, it is not clear whether the law of qualified privilege therein has also been adopted. If the Oklahoma Supreme Court does affirmatively adopt the *Restatement* qualified privilege approach for privacy claims on appeal, Guinn's judgment for public disclosure of private facts may be reversed.

With regard to Guinn's claim for intentional infliction of emotional distress, it is more difficult to affirm the judgment below. It is less likely that a cause of action will be sustained under Oklahoma law than under the *Restatement* approach. Given that the Elders were arguably acting within the scope of their authority, it is difficult to establish that their actions rose to the level of being intentional or reckless, and extreme and outrageous. Guinn has argued in response that the Elders abused their position of authority and that their actions were indeed extreme and outrageous, as well as intentional or reckless.

The issues in *Guinn* boil down to a confrontation between the guaranteed constitutional rights of the litigants. On the one hand there is Marian Guinn's right to privacy. Should that right extend to protect individuals from all types of exposure to their private lives? On the other hand there is the defendants' right to exercise their religious beliefs. Should free exercise rights preclude the courts from regulating any matter involving religious doctrine, especially those involving church discipline? This confrontation between these fundamental constitutional rights cannot easily be resolved.

If the Oklahoma Supreme Court determines that Guinn should not have recovered, as a matter of law, on any of her claims, some extremists will no doubt argue that religious groups will be free to act in the name of religion with total disregard for the rights of others. Predictions of a new type of religious persecution may well follow the opinion of one commentator who recently remarked "[t]here was a time when religion ruled the world—it is known as the Dark Ages."[213]

If the Oklahoma Supreme Court affirms the decision below with respect to one or more of Guinn's claims, some extremists on the other end of the spectrum will likely complain that parishioners who have violated the rules of a religion or religious congregation will sue the congregation whenever the violator is disciplined, whether such discipline is applied in accordance with established disciplinary procedures or not. The result, it

213. Cahan, *The Laws of Religion and Society Meet on Common Ground at the Center for Church/State Studies,* STUDENT LAW. 51 (Mar. 1985) (quoting Ruth Hurmence Green).

may be argued, will be the total revocation of the power of religious congregations to deal with matters of internal discipline, leading to state control of religion.

A more reasonable view of the decision on appeal will be to treat the opinion as the beginning of a painstaking process of defining how the constitutional rights to privacy and free exercise of religion shall interrelate. The outcome in *Guinn* will address but one facet of this complicated relationship. In the realm of constitutionally protected freedoms no single right has priority to the exclusion of any others. Courts should balance these rights when they come in conflict so as to make new law which will best serve society. The decision on appeal in *Guinn* will represent the culmination of such a balancing process and will serve as a foundation for the development of the law in this important and complex area.

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